



DEPARTMENT OF VETERANS AFFAIRS

8320-01

48 CFR Part 808

Docket VA-2019-VACO-0018

**Issuance of Class Deviation from VA Acquisition Regulation (VAAR) Part 808—
Required Sources of Supplies and Services and Conforming Amendments**

AGENCY: Department of Veterans Affairs (VA)

ACTION: Temporary rule; request for comments

SUMMARY: VA provides notification that the agency has issued a class deviation from VA Acquisition Regulation (VAAR) Part 808—Required Sources of Supplies and Services. VA is amending the VAAR to implement the Federal Circuit’s mandate. VA has determined that publication of this notification in the **FEDERAL REGISTER** would be beneficial to both the agency’s acquisition workforce and industry stakeholders. The class deviation, which is effective May 20, 2019, was issued to immediately implement the Federal Circuit’s mandate, and this publication is to further notify the public in order to avoid confusion regarding applicable policy and to make conforming amendments to the CFR. The public is invited to submit comments on VA’s approach to implementing the Federal Circuit mandate, as set forth in the class deviation and the conforming amendments to the CFR set forth in this publication.

DATES: The rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] through July 1, 2021. The class deviation is effective as of May 20, 2019.

Comments: Interested parties are invited to submit comments in writing by [Insert date 30 days after date of publication in the FEDERAL REGISTER],

ADDRESSES: Written comments may be submitted through

<http://www.regulations.gov>; by mail or hand delivery to the Director, Office of Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue NW, Room 1064, Washington DC 20420; or by fax to 202-273-

9026. Comments should indicate that they are submitted in response to Docket #VA-2019-VACO-0018, titled - “Issuance of Class Deviation from VA Acquisition Regulation (VAAR) Part 808 — Required Sources of Supplies and Services.” During the comment period, comments may also be viewed online through the Federal Docket Management System at www.regulations.gov. The full class deviation text is available at:

<https://www.va.gov/oal/docs/business/pps/deviationVaar20190520.PDF>.

FOR FURTHER INFORMATION CONTACT: Sheila P. Darrell, Ph.D., CFCM, Office of Acquisition and Logistics (003A), Procurement Policy and Warrant Management Service (003A2A) via email at VA.Procurement.Policy@va.gov or (202) 632-5288. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: On October 17, 2018, the Federal Circuit, which has nationwide appellate jurisdiction over challenges to federal agency procurement decisions, issued a decision in *PDS Consultants, Inc., v. The United States, Winston-Salem Industries for the Blind* (PDS Consultants), 907 F.3d 1345 (Fed. Cir. 2018). In the decision, the Federal Circuit noted that in 2016 the United States Supreme Court, in its decision in *Kingdomware Technologies, Inc. v. United States*, held that, “[e]xcept when the [VA] uses the noncompetitive and sole-source contracting procedures in subsections (b) and (c), § 8127(d) requires the [VA] to use the Rule of Two before awarding a contract to another supplier.” However, the Federal Circuit acknowledged

that *Kingdomware* did not directly address the interaction between 38 U.S.C. 8127 and the Javits-Wagner O'Day Act (JWOD), 41. U.S.C. § 8504, and, instead focused on whether VA had the discretion to place orders under a preexisting Federal Supply Schedule before resorting to the Rule of Two.

The Federal Circuit further found that, under 38 U.S.C. § 8128(a), the Secretary of Veterans Affairs, when “procuring goods and services pursuant to a contracting preference under [title 38] or any other provision of law...shall give priority to a small business concern owned and controlled by veterans, if such business concern meets the requirements of that contracting preference.” (emphasis added). The Federal Circuit found that the phrase “or any other provision of law” by its terms encompasses the JWOD. Therefore, the Federal Circuit found that where a product or service is on the Procurement List and ordinarily would result in the contract being awarded to a nonprofit qualified under the JWOD, 38 U.S.C. § 8127(d) would require VA to apply the VA Rule of Two before awarding a contract to a qualified nonprofit organization.

VA provides notice that the agency has issued a class deviation from VA Acquisition Regulation (VAAR) Part 808—Required Sources of Supplies and Services on May 20, 2019. The class deviation from the VAAR supersedes and effectively updates the language previously set forth in Class Deviation from 808.002, Priorities for Use of Mandatory Government Sources, dated February 9, 2018. On May 20, 2019, the United States Court of Appeals for the Federal Circuit (the Federal Circuit) issued a mandate effectuating the October 17, 2018 decision in *PDS Consultants, Inc., v. The United States, Winston-Salem Industries for the Blind*, (PDS Consultants) and creating a binding circuit precedent which necessitated immediate policy change. Accordingly,

the class deviation authorizes contracting officers to deviate from VAAR 808.002 and 808.603 to reflect language consistent with the decision of the Federal Circuit.

Specifically, the class deviation requires VA contracting officers to apply the VA Rule of Two, as implemented in VAAR subpart 819.70, before awarding a contract to a qualified nonprofit organization under the Javits-Wagner O'Day Act (JWOD) or making a contract award to Federal Prison Industries, Inc. (FPI). The deviation clarifies that if VA is unable to award to a Vendor Information Pages (VIP)-listed and verified service-disabled veteran-owned small business (SDVOSB) or a veteran-owned small business (VOSB) using the procedures set forth in VAAR subpart 819.70, AbilityOne nonprofit organization and FPI would retain their mandatory source status.

VA has determined that this publication in the **FEDERAL REGISTER** is necessary to make conforming edits to the CFR in order to clarify existing requirements to both the agency's acquisition workforce and industry stakeholders.

This document provides a comment period of 30 days in which commenters may address VA's approach to implementing the Federal Circuit mandate, as set forth in the class deviation and the conforming amendments to the CFR set forth in this publication. VA believes 30 days is sufficient to provide comments given the litigation history and the information being requested. As discussed above, the Federal Circuit's mandate required that the agency's acquisition workforce immediately comply with the binding precedent. This demonstrates that a delay of the effective date of the rule on the public would be unnecessary. Accordingly, the Secretary finds good cause to dispense with the opportunity for advanced notice and opportunity for public comment and to publish

this temporary rule with an effective date of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Executive Orders 12866

VA has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action, and it has been determined not be a significant regulatory action under E.O. 12866.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. Section 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. Section 804(2).

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on June 13, 2019, for publication.

Dated: June 18, 2019

Jeffrey M. Martin,
*Assistant Director,
Office of Regulation Policy & Management,
Office of the Secretary,
Department of Veterans Affairs.*

For the reasons set forth in the preamble, we amend 48 CFR part 808 as follows:

PART 808 – REQUIRED SOURCES OF SUPPLIES AND SERVICES

1. The authority citation for part 808 continues to read as follows:

AUTHORITY: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c) and (d); and 48 CFR 1.301–1.304

2. In § 808.002, revise the section heading and paragraphs (a) and (b) to read as follows:

§ 808.002 Priorities for use of mandatory Government sources.

(a) *Sources.* Contracting activities shall satisfy requirements for supplies and services from or through the mandatory sources listed below in descending order of priority:

(1) *Supplies.* (i) VA inventories including the VA supply stock program (41 CFR 101-26.704) and VA excess.

(ii) Excess from other agencies (see FAR subpart 8.1).

(iii) Federal Prison Industries, Inc. (see VAAR 808.603). Prior to considering award of a contract to Federal Prison Industries, Inc, contracting officers shall apply the VA Rule of Two to determine whether a requirement should be awarded to veteran-owned small businesses under the authority of 38 U.S.C. 8127-28, by using the preferences and priorities in subpart 819.70. If an award is not made to a VIP-listed and verified service disabled veteran-owned small business (SDVOSB)/veteran-owned small business

(VOSB) as provided in subpart 819.70, FPI remains a mandatory source in accordance with FAR 8.002.

(iv) Supplies that are on the Procurement List maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled, known as AbilityOne (FAR subpart 8.7). Prior to considering award of a contract under the AbilityOne program, contracting officers shall apply the VA Rule of Two to determine whether a requirement should be awarded to veteran-owned small businesses under the authority of 38 U.S.C. 8127-28, by using the preferences and priorities in subpart 819.70. If an award is not made to a VIP-listed and verified SDVOSB/VOSB as provided in subpart 819.70, AbilityOne remains a mandatory source in accordance with FAR 8.002. All new VA requirements must be approved by the Chief Acquisition Officer, via the Senior Procurement Executive, before contacting the Committee to request addition of new items to the Procurement List.

(v) Wholesale supply sources, such as stock programs of the General Services Administration (GSA) (see 41 CFR 101-26.3), the Defense Logistics Agency (see 41 CFR 101-26.6), the Department of Veterans Affairs (see 41 CFR 101-26.704), and military inventory control points.

(2) Services that are on the Procurement List maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled, known as AbilityOne (FAR subpart 8.7). Prior to considering award of a contract under the AbilityOne program, contracting officers shall apply the VA Rule of Two to determine whether a requirement should be awarded to veteran-owned small businesses under the authority of 38 U.S.C. 8127-28, by using the preferences and priorities in subpart 819.70. If an award is not

made to a VIP-listed and verified SDVOSB/VOSB as provided in subpart 819.70, AbilityOne remains a mandatory source in accordance with FAR 8.002. All new VA requirements must be approved by the Chief Acquisition Officer, via the Senior Procurement Executive, before contacting the Committee to request addition of new items to the Procurement List.

(b) *Unusual and compelling urgency.* The contracting officer may use a source other than those listed in paragraph (a) of this section when the need for supplies or services is of an unusual and compelling urgency (see FAR 6.302-2, 8.405-6 and 13.106-1 for justification requirements).

* * * * *

3. Revise § 808.603 to read as follows:

§ 808.603 Purchasing priorities.

A waiver from FPI is not needed when comparable supplies and services are procured in accordance with subpart 819.70.

[FR Doc. 2019-13217 Filed: 6/21/2019 8:45 am; Publication Date: 6/24/2019]